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No. 94-1740

In The

Supreme Court of the United States

October Term, 1994

PACIFIC NORTHWEST GENERATING COOPERATIVE,

Petitioner,

v.

NORTHWEST POWER PLANNING COUNCIL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Ninth Circuit correctly interpret section 839(b)(h) of the Northwest Electric Power Planning and Conservation Act to require that the Northwest Power Planning Council give a "high degree of deference" to state and federal fishery agencies' and Indian tribes' recommendations when promulgating its Fish and Wildlife Program and to their interpretations of the Act's fish and wildlife provisions.

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STATEMENT OF THE CASE

This case involves the interpretation of the detailed fish and wildlife provisions, section 839b(h),of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) 16 U.S.C. § 839 et seq. PNGC seeks review of an issue that was not part of the holding of the Ninth Circuit's opinion in *Northwest Resource Information Center et al. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994). Rather, PNGC seeks certiorari to address a statement by that Court which it claims is dicta.

The Court's "dicta" statement that PNGC finds objectionable provides that the Northwest Power Planning Council (hereinafter NPPC or Council) owes a "high degree of deference" to the recommendations of federal, state, and tribal fishery managers for Fish and Wildlife program measures to protect, mitigate, and enhance fish and wildlife resources in the Columbia basin.[1] PNGC also believes that the Court incorrectly stated that these entities' interpretations of the specific fish and wildlife provisions of the Act should receive a high degree of deference.[2]

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[1] *Id.* at 1338. These recommended measures are solicited from the regional fishery experts each time the Council amends its Fish and Wildlife program that the Act directs it to adopt, and which is designed to "protect, mitigate, and enhance fish and wildlife" of the Columbia basin. 16 U.S.C. section 839b(1)(A).

[2] The Court stated:

[T]he unique experience and expertise of fishery managers make their interpretations of section 839b, especially section 839b(h)(6), particularly helpful." *Id.* at 1389. Section 839b(h)(6) are criteria that must meet in order to be included in the Fish

PNGC asserts in its Statement of the Case that *a single provision* of the Northwest Power Act, section 839b(h)(7), was the basis for the Ninth Circuit's statement that a "high degree of deference" is due the federal, state, and tribal fishery mangers' recommendations and interpretations of the Act on matters within their expertise and legal responsibility. However, it is manifest from the Ninth Circuit's opinion that PNGC's characterization of that Court's treatment of the issue is incorrect.

The Ninth Circuit engaged in a laborious analysis of the *entire* statutory scheme of sections 839b(e)and(h) of the Act to conclude that those entities with fish and wildlife expertise and legal responsibility should receive deference from the Council on fishery protection issues. *NRIC* at 1386-89. After analyzing the face of the statute, the Court then looked to legislative history, and to parallel case law to confirm its statutory analysis. *Id.* Therefore, contrary to PNGC's representations that this case is about the construction of a single "key provision" of the Northwest Power Act, it is more accurate to state that the case involves the construction of the all of section 839b(h)

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and Wildlife Program. Among these 839b(h)(6) criteria are:

> [Measures must] complement the existing and future activities of the Federal and the region's state fish and wildlife agencies and appropriate Indian tribes (839b(h)(6)(A));
>
> [Measures must] be based on, and supported by, the best available scientific knowledge (839b(h)(6)(B));
>
> [Measures must] be consistent with the legal rights of appropriate Indian tribes in the region (839b(h)(6)(D).

These are a sample of the provisions that the Court stated that the region's expert fishery management agencies and tribes should be expert at interpreting.

of the Act, and that section's relationship to the Act's other provisions and purposes.

PNGC expounds on what it perceives as the "primary purpose" for which the Northwest Power Act was enacted, and emphasizes that enactment took place in the face of pending regional energy shortages and allocation disputes. Because PNGC's recital of the context in which the Northwest Power Act was passed has little if any relevance to its petition, the Yakama Nation will not take issue with the bulk of the inaccuracies contained or inferred therein.[3] However, in the interest of balance and a more complete historical perspective, two points must be addressed.

First, contrary to PNGC's claim, the Northwest Power Act does not have a single power related "primary purpose." The plain text of the Northwest Power Act specifically enumerates six purposes. 16 U.S.C. § 839. The plain language of the statute states that all of these purposes must be construed in a consistent manner.[4] This language illustrates that all six of the Act's purposes are of equal import. One of the express statutory purposes of the Northwest Power Act is:

> to protect, mitigate and enhance the fish and wildlife, including related spawning grounds

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[3] It should also be noted that though PNGC was an intervenor in the proceedings below, it filed no briefs and did not present any arguments to the Court. If PNGC believes that these factors are somehow important for resolution of the question it desires to put before the Court, it should have first presented them for the Ninth Circuit's consideration.

[4] 16 U.S.C. § 839.

> and habitat, of the Columbia River and its tributaries, particularly Anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation which are dependent on suitable environmental conditions substantially obtainable from the management of and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.[5]

Though PNGC's particular narrow interest in the Columbia basin is the production and allocation of hydropower, the Northwest Power Act's remedial purposes and scope are far broader, and by its express terms makes fisheries protection and restoration, as well as other environmental concerns co-equal purposes.

Second, as Congress was drafting the bill that would become the Northwest Power Act, the National Marine Fisheries Service (NMFS) was conducting an inquiry into the status of Columbia basin salmon stocks, and the need for listing some of these stocks as threatened or endangered under the Endangered Species Act.[6] When the Northwest Power Act was enacted, NMFS terminated its inquiry under the ESA, citing the newly enacted Northwest Power Act as a means to recover the depressed salmon species.[7] Contrary to PNGC's characterization,

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[5] 16 U.S.C. § 839(6).

[6] *See* Fed. Reg. 45,628 (1978).

[7] *See* John Ogan, *The Need For A Smolt Travel Time Objective In The Columbia Basin Fish And Wildlife Program To Protect And Restore The Northwest's Imperiled Salmon Runs*, 24.2 Environmental Law 675 (1994).

salmon restoration and protection was not simply an insignificant afterthought or addendum in the Northwest Power Act. These two factors ignored by PNGC in its narrowly tailored recitation of the history of the Northwest Power Act are recognized in the Ninth Circuit's opinion, 35 F.3d 1371 (9th Cir. 1994). The Yakama Nation submits that this court should look to the Ninth Circuit's opinion and the authorities cited therein for a complete presentation of the context in which the Northwest Power Act was enacted.

REASONS FOR DENYING THE WRIT

A. This Court Should Deny the Writ Because PNGC's Allegations That The Ninth Circuit's Dicta Will Undermine The Council's Ability To Strike a Balance Between Fisheries Protection And Hydropower Production Is Demonstrably Untrue.

In its petition, PNGC sounds an alarm that if the Ninth Circuit's deference statement is left intact and implemented, a "delicate balance" will be upset, the power objectives of the Act will be severely compromised, and the discretionary power of the Northwest Power Planning Council will be wrongfully undermined. However, PNGC's grave prognostications are not supported by recent events in the Columbia basin, PNGC's own actions, or those of the other entities allegedly affected by the Ninth Circuit's "deference statement."

The Ninth Circuit entered its judgment below on September 9, 1994. At this time, the Council was well into its process of amending the Fish and Wildlife Program.

As required by the Act, the Council had solicited and received recommendations from the regional federal, state, and tribal fishery managers.[8] The Council had also received discretionary recommendations from power interests and others in the region that the Act does not require, but nonetheless provides for.[9]

These recommendations had been made available for review and comment. In sum, the Council's amendment process was advanced. When the Ninth Circuit entered its judgment on September 9, rather than suspend its rule making process, the Council chose to proceed with finalizing the amendments to its Fish and Wildlife Program.[10] The Council adopted a comprehensive set of program amendments on December 15, 1994. In its final amended Fish and Wildlife Program, the Council states that:

> [T]he Council determined that it could respond to the court's remand when it acted on the August 1994 recommendations.[11]

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[8] The statute provides that the Council "*shall* request in writing . . . from the Federal and the region's State fish and wildlife agencies . . . and appropriate Indian tribes recommendations" for Program amendments. 16 U.S.C. § 839b(h)(2).

[9] All other recommendations are strictly voluntary, and it is not necessary for the Council to request them prior to amending the Program. 16 U.S.C. § 839b(h)(3) illustrates this, as it provides that "the region's electric power producing agencies, customers, and public *may* submit recommendations of the type referred to in paragraph (2) of this subsection."

[10] *See* Brief for Respondent Northwest Power Planning Council at 4-5, filed May 22, 1995.

[11] Northwest Power Planning Council, Columbia Basin Fish and Wildlife Program 15-1 (Dec. 1994).

Thus, contrary to PNGC's assertion that the Ninth Circuit's statement directing that deference be given regional fishery managers would somehow hamstring the Council and its discretionary decision-making, or disruptively shift the balance of authority from the Council to the fishery managers, the Council accepted and implemented the Ninth Circuit's judgment in stride.

In addition, the Northwest Power Planning Council, the sole entity that is directly responsible for implementing the Ninth Circuit's deference statement, did not seek review of the Ninth Circuit's decision. The Council has filed with this Court a Brief *opposing* granting the writ of review.[12] The Council has chosen to accept the guidance provided by the Ninth Circuit, and move forward with carrying out its statutory planning responsibilities rather than spend valuable resources in protracted litigation. PNGC's alarmist claims that the result of the Ninth Circuit's decision would paralyze the Council and render it powerless to craft a balanced Fish and Wildlife Program ~~are~~ demonstrably untrue.

PNGC claims that its members will suffer harm as a result of the Ninth Circuit's statement that the Council owes high deference to the regional fishery managers on fishery issues. PNGC posits that because the Ninth Circuit has instructed the Council to defer to the expertise and legal responsibilities of the region's fishery managers on fishery protection recommendations, fishery protection recommendations offered by hydropower purchasers

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[12] Brief for Respondent Northwest Power Planning Council at 1, 5, filed May 22, 1995.

and marketers will not be given equal weight by the Council. PNGC argues that this will necessarily lead the Council to adopt a Fish and Wildlife Program out of "balance" with the power objectives of the Act, and inimical to regional power interests like itself. PNGC seeks a writ primarily for this reason.

PNGC's argument rings hollow. PNGC did not challenge the Council's newly adopted 1994 Fish and Wildlife Program. In fact, not a single hydropower or utility interest in the region, including the Bonneville Power Administration, sought judicial review of the Council's new 1994 Fish and Wildlife Program. Hydropower interests brought absolutely no challenges even though the Council expressly implemented the "high degree of deference" principle from the Ninth Circuit opinion in its 1994 Fish and Wildlife Program. The total absence of any challenge to the Council's new Program illustrates that PNGC's alleged harm is illusory, and its laments regarding the impacts of the Ninth Circuit's decision to regional hydropower are alarmist and overstated.[13]

Finally, not a single federal, state, or Indian tribe fishery management agency challenged the Council's new 1994 Fish and Wildlife Program. Again, this is very

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[13] The Idaho Power Company did initially submit a petition to the Ninth Circuit for review of the newly adopted 1994 Fish and Wildlife Program. However, the petition was voluntarily dismissed relatively soon after it was submitted. The "deference issue" that PNGC raises here was not raised in the short-lived petition.

significant because the Council claims to have implemented the Ninth Circuit's directive regarding the deference that it owes these entities. The absence of any challenge to the newly adopted program by the fishery management entities indicates that the Council's response to the Ninth Circuit's direction was satisfactory to the fishery managers in the region.

In summary, the Council has accepted and implemented the decision of the Ninth Circuit. A new Fish and Wildlife Program was adopted in late 1994, and not a single power interest (including PNGC), state, federal or tribal fishery management entity, or environmental group challenged it. With the exception of PNGC, all of the hydropower and fisheries interests and managers in the region have put this issue and this litigation behind them, and are moving forward to constructively find solutions that will allow for a peaceful coexistence of hydropower and salmon in the Columbia basin.[14]

B. The Ninth Circuit's Statement Regarding The Amount Of Deference Owed To The Fishery Managers Was Not A Part Of The Case Holding.

In its Petition, PNGC is very careful to try and disguise that it is seeking a writ of certiorari to appear before this court and argue the merits of what it believes

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[14] At the time of writing, various agencies are working to implement the measures outlined in the amended Fish and Wildlife Program. In addition, the National Marine Fishery Service and a collection of Indian Tribes with reserved fishing rights in the Columbia Basin are each circulating for review comprehensive plans to restore the depleted salmon runs.

is "unnecessary dicta" from the Ninth Circuit opinion. In its Petition for Rehearing and Suggestion for Rehearing En Banc, PNGC called the Ninth Circuit's statement regarding deference "dicta" seven separate times, and persistently argued that the statement was not a part of the case holding. In its brief PNGC stated:

> The Court's holding is narrow. The only thing the Court *held* was that the Council had failed to explain adequately its reasons for rejecting recommendations that were not included in the program, as required by 16 U.S.C. 839b(h)(7) (emphasis in original).

Nonetheless, PNGC asks this court to grant a writ to review a portion of the Ninth Circuit opinion that it asserts will not be binding in subsequent litigation.[15] The Yakama Nation respectfully suggests that this Court ought not expend its limited resources dealing with a Petitioner who asks the Court to review "dicta" of the lower court. If PNGC takes issue that court's "dicta," it should place its arguments before the Ninth Circuit in a setting where it is claiming actual, rather than speculative harm. The Ninth Circuit would be able to interpret its decision and evaluate PNGC's "dicta" arguments in that forum with the benefit of some factual context.

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[15] *See Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not control the judgment in a subsequent suit when the very point is presented for decision").

A brief statement of the Court's holding, and an explanation of how the "the deference issue" arose may benefit this Court. First, the holding of the Ninth Circuit was that the Council had failed to explain in writing, as part of the final program, why it had rejected various recommendations of the region's fishery managers. This is a procedural requirement of the Act. *NRIC* at 1386. In addition, the court held that the Council had not adopted "biological objectives" as required by the Act. *NRIC* at 1395. The Court addressed the issue of the degree of deference that the Council owes the regional fishery managers only after stating that it was remanding the case.

The "deference issue" was raised by the Yakama Nation and others in their opening and reply briefs, and the Council responded and argued its position in its brief. In short, the Yakama Nation and environmental groups argued that the Council owed the recommendations of the fishery managers great deference, and the Council argued that it owed these recommendations nominal deference. Recognizing the importance of the issue, the disparate positions of the parties, and the likelihood that leaving the issue unresolved would almost certainly mean new litigation after an amended Fish and Wildlife Program was developed on remand, the Ninth Circuit addressed this deference issue. After a thorough review of the statute as a whole, the Court agreed with the Yakama Nation and environmental groups, and stated that the Council owed the regional fishery experts that are legally responsible for fisheries management a "high degree of deference" on areas within their expertise and legal responsibility.

Though PNGC was an intervenor, and could have participated in the debate on this issue taking place in the lawsuit, it remained silent, submitted no briefs, and offered no arguments for the Ninth Circuit's consideration. Now, after the lawsuit has ended and a new Fish and Wildlife Program has been adopted and is being implemented, PNGC seeks a writ to belatedly be heard on this issue. As an intervenor, PNGC received all of the briefs filed in the case, and had ample notice of the debate being waged on this issue, as well as the specific positions taken by the Yakama Nation, environmental groups, and the Council. PNGC emphatically argues that the critical nature of this issue demands this Court's review. If this is truly so, one would have expected at the very least minimal participation in the underlying litigation.

It appears from PNGC's Petition for Rehearing and Suggestion for Rehearing En Banc filed with the Ninth Circuit on October 21, 1994, that PNGC desires to argue before this Court that the Ninth Circuit erred because it did not base its analysis more heavily on the legislative history of the Act:

> [T]he Court's Interpretation Of The Meaning Of 'Due Weight' Is Inconsistent With The Legislative History Of The Northwest Power Act

PNGC Petition for Rehearing and Suggestion for Rehearing En Banc, *Table of Contents*, I. In its Rehearing Petition, PNGC states:

> The NPA's legislative history, which was not substantially briefed for the Court and was not discussed in the Court's opinion, demonstrates

that the Court's conclusions regarding the meaning of 'due weight' are simply wrong.

PNGC could have weighed in much earlier with its legislative history based arguments. These arguments would have most certainly failed, however, because as the Ninth Circuit correctly recognized, the plain language of the Act supported its conclusion that a high degree of deference was due fishery experts' recommendations.

In summary, the Council received, accepted, and implemented the Court's directive to provide a high degree of deference to the fishery experts in certain areas. The lack of any challenge to the newly adopted Fish and Wildlife Program by any party or entity in the region is a testament to the Ninth Circuit's wisdom in choosing to provide guidance on this issue.

C. The Ninth Circuit Correctly Analyzed The Entirety Of Section 839b(h) Of The Act, Not Just A Single Provision To Find That The Council Owes The Regional Fishery Managers A High Degree Of Deference On Fishery Issues.

To assist the Council on remand, the Ninth Circuit stated that the Council owes the regional fishery managers a "high degree of deference" on fishery issues. *NRIC* at 1386. PNGC asserts that the Ninth Circuit reached this conclusion solely on the basis of 839b(h)(7), which provides that "due weight" shall be given the views and recommendations of fishery managers. PNGC misunderstands or misrepresents the Ninth Circuit's treatment of the issue.

In its briefing before the Ninth Circuit, the Yakama Nation and NRIC argued that section 839b(h) *as a whole* mandated that the Council would defer to the fishery managers on certain issues. The Council responded in its brief that the amount of deference required by the *many* relevant provisions of the Act had been properly given. The Council specifically cited sections 839b(h)(2), (3), (4), (5), (6), (7) as relevant for quantifying the amount of deference that is due the fishery agencies. Unlike PNGC in its present petition, all litigants in the underlying case recognized that section 839b(h)(7) and its "due weight" phrase is but one small piece of a large and complex statutory scheme that must be analyzed and interpreted as a whole to resolve the "deference issue."

The Ninth Circuit analyzed and interpreted the entirety of section 839b(h) to conclude that regional entities legally responsible for fishery management must receive a "high degree" of deference on fishery protection issues. Contrary to PNGC's framing of the Question Presented and its other arguments, the court did not rely singly on section 839(h)(7) and its "due weight" language to reach its conclusion. This is absolutely clear in the court's opinion.

After finding the Council's actions unlawful in two regards and stating that the Fish and Wildlife Program would be remanded, the Court addressed the issue of how much deference the Council must give the expert fishery management entities on fishery issues. The Court started the analysis as follows:

> [4] There is no doubt that section 839b(h)(7) requires that deference be given to the recommendations and expertise of agencies and tribes – the question is *how much deference is due.*

NRIC at 1386, (emphasis added).

The court then proceeded to look at the many provisions of the Act *other than* 839b(h)(7) to *quantify* the amount of deference that was due. The court first reviewed the provisions that guide the Council's other major planning duty, the development of a regional Power Plan, and compared these with the many provisions that guide Fish and Wildlife Program planning duties. The Court then did an exacting review of what is required of sections 839b(h) *as a whole*, citing specifically sections 839(h)(2), (4), (5), (6), (7). Thus, after reviewing provisions of the Act that fill six full pages of the United States Code, the Court found that these provisions of section 839b give meaning to what is meant by "due weight" in the single provision 839b(h)(7). *NRIC* at 1386-1388.

In short, the Ninth Circuit did not use section 839b(h)(7) to decide *how much* deference was due the fishery agencies and tribes. Section 839b(h)(7) was simply a signal that *some* degree of deference was due. After receiving the signal of this one provision, the court then looked to the statute as a whole to decide how much deference must be given. PNGC's arguments misconstrue the Ninth Circuit's interpretation and use of section 839b(h)(7), ignore the comprehensive statutory analysis done by the Court, and grossly oversimplify the basis for the Court's ruling.

D. The Court's Decision Does Not Create An Authority Split, But Rather, Illustrates a Consistent Approach In Interpreting "Due Weight" Provisions In Various Statutes.

PNGC asserts that the Ninth Circuit's decision creates an authority split between the Circuits as to the correct interpretation of the phrase "due weight." PNGC simplistically argues that "due weight" in the context of the Federal Power Act has been interpreted to mean "due regard," and that this conflicts with the Ninth Circuit's interpretation of the phrase "due weight" as it is used in the Northwest Power Act. PNGC's argument is misguided as discussed in C. above, and flows from its failure to recognize a time honored and elementary principle of statutory construction – that one must construe a statute as a whole:

> In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.

United States v. Heirs of Boisdore, 12 L.Ed. 1009, 1013 (1850).

As discussed in section C. above, PNGC erroneously argues that section 839b(h)(7) was the basis for the Ninth Circuit's *quantification* of the amount of deference that is owed regional fishery managers by the Council. Again, this is not so. As the Court stated, Section 839b(h)(7) simply indicated that *some* degree of deference was due, leaving the quantification of *how much* deference was due

to be gleaned from the statute as a *whole*.[16] Similarly, in the case cited by PNGC as illustrating a circuit conflict, *National Wildlife Federation v. FERC*, 912 F.2d 1471 (D.C. Cir. 1990), the Court expressly stated that it defined "due weight" by looking at the Federal Power Act as a whole.

In *NWF*, in the very language cited by PNGC in its petition, the Court twice stated that it was its reading of the *statute*, not the single "due weight" provision, that led to its finding that "due regard" was the amount of deference due under section 10(j). *Id* at 1480.

Given that the Federal Power Act and the Northwest Power Act are very distinct statutes with very different purposes, it is unsurprising that these Courts quantified the amount of deference owing recommendations of fisheries managers under their respective "due weight" provisions differently. In fact, the second case cited by PNGC, *California v. FERC*, 966 F.2d 1541 (9th Cir. 1992) provides an excellent explanation as to why the *NRIC* Court and the *NWF* Court quantified the degree of deference due fishery recommendations differently under similar "due weight" provisions. In support of its conclusion that FERC had properly considered fishery recommendations the *California*, Court stated that:

> Section 10 of the FPA grants FERC broad authority to weigh the salient factors at issue in granting a license and to impose appropriate conditions on hydroelectric licenses. FERC's

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[16] *See NRIC* at 1388 ("Accordingly, Congress required in § 839b that fishery managers be given a high degree of deference in development of a fish and wildlife program for the Basin").

> 'broad and paramount' role in establishing licensing conditions for a hydroelectric project was refined and reaffirmed in ECPA.

Id. at 1550.

This statement clearly shows that the Court looked to section 10 of the Federal Power Act *as a whole*, and, more importantly, to FERC's role and authority for hydropower licensing as defined in the entire statute. Finding that FERC's authority was "broad and paramount" in the Power Act was an important factor in quantifying the deference that agency owed in regards to licensing conditions.

Conversely, the Council's role and authority in regards to Fish and Wildlife was not judicially defined prior to the *NRIC* decision where the Court stated that "section 839b(h) binds, more than unleashes, the Council's discretion with respect to fish and wildlife issues. *NRIC* at 1388. This finding is consistent with the prior analysis offered by one of the most prolific commentators on the Northwest Power Act, and the Council's long-standing legal counsel. The commentator discussed the Council's limited role in fisheries planning under the Northwest Power Act:

> Implementation of the Council's power plan and fish and wildlife program requires many actors, federal and nonfederal. . . . *Instead of concentrating all authority in a single agency, the Act contemplates a shared approach to problems.* In the words of one of the Council's founding members, 'the Act has taken the preexisting regional pluralism

> and expanded on it. *The result is a wide sharing of legal authority to make the Act work.*'[17]

Thus, it is hardly surprising that the *NWF* and *NRIC* Courts quantified the amount of deference due under a "due weight" provision differently when, under the Federal Power Act FERC has "broad and paramount" authority, while the Northwest Power Act requires a sharing of legal authority among many federal and nonfederal actors and the Council.

In summary, different statutes yield different interpretations of the phrase "due weight." Depending on the statutory scheme in its entirety, the amount of deference owed to the recommendation of some entity by the agency implementing a particular statute may range from "very slight deference" at one extreme to "strict acceptance" at the other. To argue, as PNGC does, that the phrase "due weight" has a uniform definition divorced from the rest of any statute in which it is found is insupportable. Contrary to PNGC's claim, the Ninth Circuit decision does not create a split among the Circuits in any regard. Rather, a comparison of the cases cited by PNGC with the Ninth Circuit's decision in *NRIC* illustrates that the Circuits' statutory construction of the phrase "due weight" have been done in a consistent and pragmatic manner, properly looking to the relevant statute in its entirety.

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[17] John M. Volkman, *Testing New Forms Of River Basin Governance: Implications Of The Seattle Master Builders Case*, 17.4 Environmental Law 849 (1987).

E. There Can Be No "Conflict Between The Circuits" As Regards the Northwest Power Act, As All Claims Brought Pursuant To That Act Are Heard Solely In The Ninth Circuit.

As argued in D. *supra*, there is no "conflict among the circuits" on any legal issue here involved. Assuming arguendo that there was a "split" in regards to the interpretation of the phrase "due weight," such a split is of no national legal significance, as the Northwest Power Act has application only in the Ninth Circuit. 16 U.S.C. § 839e(5). Accordingly, the *NRIC* opinion and its interpretation of the phrase "due weight" has no application outside of the Ninth Circuit. The opinion deals with a specific statute limited by its own terms to the Northwest, and to interpretation by the Ninth Circuit. Petitioner's remedy is to challenge an action taken by the Council in the Ninth Circuit. There is no basis for review by this Court.

CONCLUSION

PNGC petitions for certiorari asserting that a delicate balance between the fish and wildlife protection and hydropower purposes of the Northwest Power Act has been upset by the Ninth Circuit's "dicta" statement. However, actual implementation of the Court's statement by the Northwest Power Planning Council has shown this to be untrue. A new Fish and Wildlife Program was crafted in late 1994 which was not challenged by a single entity in the region. The writ should be denied because it

is apparent that PNGC's alarmist cry that a fragile balance has been toppled is an overreaction.

PNGC seeks the writ so that it may place before this court arguments based upon its interpretation of selected segments of the legislative history of the Northwest Power Act that a statement made by the Ninth Circuit that it claims is dicta is incorrect. The writ should be denied because the text of the statute supports the Ninth Circuit's statement, and because this Court would better expend its resources reviewing case holdings rather than "dicta" statements.

PNGC's claim that the Court's decision has created a conflict between the Circuits is based on a flawed analysis of the *NRIC* Court's opinion, and the cases cited in its petition. PNGC's errant argument that a conflict has been created flows from its failure to recognize that the Court's have not relied upon the single "due weight" phrase to determine the amount of deference due recommendations, but rather settle this quantification issue by analysis of the entire relevant statute. Accordingly this Court should deny the Petition.

Respectfully submitted,

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